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Attorneys for Defendant
COXCOM, INC.,
dba COX COMMUNICATIONS, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

LYNN LYONS, on Behalf of Herself and All
Others Similarly Situated,

Plaintiffs,

v.

COXCOM, INC., dba COX
COMMUNICATIONS, INC., COX
ENTERPRISES, INC., and DOES 1-250,

Defendants.

Case No. 08-CV-02047-H (CAB)

**DEFENDANT COX COMMUNICATIONS
INC.'S NOTICE OF MOTION AND
MOTION TO:**

**(1) STRIKE THE CLASS ALLEGATIONS
AND DISMISS THE FIRST AMENDED
COMPLAINT FOR LACK OF SUBJECT
MATTER JURISDICTION; AND**

**(2) DISMISS THE FIRST AMENDED
COMPLAINT FOR FAILURE TO STATE
A CLAIM AND FOR FAILURE TO
PLEAD WITH PARTICULARITY**

[F.R.C.P. §§ 9, 12(b)(1), 12(b)(6), 12(f) & 23]

Hearing Date: May 18, 2009
Time: 10:30 a.m.
Judge: Hon. Marilyn L. Huff
Dept: Courtroom 13, 5th Floor

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 18, 2009, at 10:30 a.m., or as soon thereafter as the matter may be heard, in Courtroom 13 of the United States District Court, Southern District of California, San Diego Division, located at 880 Front Street, San Diego, California, defendant Coxcom, Inc. dba Cox Communications, Inc. ("Cox") will, and hereby does, move this Court (1) to strike the class definitions and class allegations for failure to allege viable classes, and to dismiss the First Amended Complaint, under Rule 12(b)(1) of the Federal Rules of Civil Procedure, for lack of subject-matter jurisdiction; (2) to dismiss the entire action, under Rule 12(b)(6), for failure to state a claim upon which relief can be granted; and (3) to dismiss the Consumer Legal Remedies Act claim for failure to plead that claim with particularity (Fed.R.Civ.P. 9(b)).

First, the complaint fails to allege ascertainable classes and otherwise to plead a class(es) that could be certified consistent with Federal Rule of Civil Procedure 23 under governing law. Plaintiff's new allegations show that adjudicating plaintiff's claims would require subscriber-by-subscriber "minitrials" to determine Cox's liability as to each subscriber. Because plaintiff has failed to allege viable classes, and because this Court's subject matter jurisdiction rests solely on the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d), the Court should strike the class definitions and the class allegations pursuant to Rule 12(f), and then dismiss the action pursuant to Rule 12(b)(1).

Second, even if the complaint did allege a viable class or classes, the first and second claims (the Georgia law contract-based claims) and the California statutory claims under the Business & Professions Code and Civil Code (the third through seventh claims for relief) fail to state a claim upon which relief can be granted, because (inter alia) Cox's advertisements, do not promise unlimited high-speed P2P file sharing at a particular speed, and Cox's contractual disclosures negate the claims of breach of contract or actionable deceptive conduct.

Third, plaintiff has still not pleaded what was false about the advertisements that form the basis of her Consumer Legal Remedies Act claim, and thus fails to plead that claim with the

1 particularity required by Rule 9(b).

2 Fourth, Cox moves to strike the allegation that Cox Enterprises, Inc. is also a defendant to
 3 this action. Plaintiff dismissed Cox Enterprises on December 3, 2009. References to Cox
 4 Enterprises and the plural version of "Defendants" throughout the FAC should therefore be
 5 stricken. (FAC at ¶ 7, *passim*.) FED. R. CIV. PROC. 12(f).

6 This Notice of Motion and Motion to Dismiss, the Memorandum of Points and Authorities
 7 in support, and the Request for Judicial Notice in support of the motion, all filed herewith, all
 8 matters which the Court may take notice, the entire file in this action, and such oral and
 9 documentary evidence as may be presented at or before the hearing.

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11 DATED: April 2, 2009

COBLENTZ, PATCH, DUFFY & BASS LLP

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By: *s/Richard R. Patch*

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Richard R. Patch
 Attorneys for Defendant COXCOM, INC.,
 dba COX COMMUNICATIONS, INC.,

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